

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE 461 7 TH AVE MARKET, INC.

Debtor.

461 7TH AVE MARKET, INC., and
YOUNG IL PARK,

Plaintiffs,

vs.

DELSHAH 461 7TH AVENUE, LLC,
DELSHAH CAPITAL, and MICHAEL
SHAH,

Defendants.

18-22671-RDD

Chapter 11

Adv. Pro. No. 18-08265-rdd

**DEBTOR'S SUPPLEMENTAL MEMORANDUM OF LAW
FOR EVIDENTIARY HEARING ON 9-5-18**

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PRELIMINARY STATEMENT

Debtor/Debtor-in-possession/Plaintiffs 461 7th Ave Market, Inc., respectfully submits this supplemental memorandum of law in advance of the September 5, 2018, hearing.

ARGUMENT

I

BECAUSE THE DOB’S APRIL 10 ISSUANCE OF “WORK PERMIT” CLEARLY SHOWS THAT THE DEBTOR’S ALLEGED “BREACHES,” RAISED BY THE NEW LANDLORD AND WAIVED BY THE FORMER LANDLORD, ARE CAPABLE OF BEING RESOLVED, AND BECAUSE THE EQUITIES HEAVILY MILITATE IN FAVOR OF THE DEBTOR’S RELIEF, AND AGAINST FORFEITURE, THE COURT SHOULD GRANT THE MOTION TO ASSUME AND FASHION APPROPRIATE, RELATED RELIEF

Justice Sherwood of the New York Supreme Court directed plaintiff to file a professionally-certified Alt-2 application for work permit. See Winter Decl.; Chang Decl.; 2-15-18 Transc. Justice Sherwood’s order assumed that the landlord would not be involved in the permit process.

Instead of allowing plan examination review by the Department of Buildings (DOB), the landlord actively interfered with one or more written complaints, beginning with the Delshah Capital letter of March 8, 2018, which was preceded and proceeded by one or more non-written communication to the DOB.

The landlord does not want the premises being pegged for “eating establishment” and not for retail similar to fashion brands on Fifth Avenue. In other words, when plaintiff’s term expires in 2022, it does not want to deal with an eating establishment; it wants to have

the premises “ready to go” for a pricey retail shop. This is the “lens” discussion spread on the record by Justice Sherwood at the end of the February 15, 2018, hearing, where he held that the tenant had the right to operate a restaurant until the end of term.

The plans filed by Jay Cho on February 27, 2018, approved on March 30, 2018, after the initial rounds of objection and back and forth would address the landlord’s claim of fire safety with a sprinkler system in the staircase (as approved by MTA, the agency having authority over this building’s sprinkler installation). The FDNY already issued a waiver for any issue with the roof. The DOB’s Commissioner already approved the kitchen. See Chang Decl. & Exhibit 6A, 6B, 6C.

Yet the DOB has revoked the work permit; only to rescind the revocation; only to then revoke the work permit yet again, and install a STOP WORK order, all due to the “owner’s statement that it did not approve the contractor.”

The goal post is dragged by the landlord from Point A to Point B, only for the tenant to find that the goal post is no longer at Point B, but at Point C, and so on. The landlord wants to use the complex regulatory DOB process to secure an eviction by blaming a tenant that has been a model tenant.

Michael Shah, a real estate speculator with a billion dollar portfolio, wants the tenant to restore the condition back to some point in Year 2003 or 2009 or something else; for sure it is well before Michael Shah became the owner in May 2015. The Affidavit of Timothy O’Brien tells a clear story of all past alterations having been expressly or impliedly approved

by the “landlord,” the legal predecessors of Michael Shah. Michael Shah and his entity Delshah 461 7th Avenue purchased the property “as is,” as is shown by the contract from February 2015. See Chang Affidavit.

Now, so that Michael Shah can obtain a whopping windfall from Macy’s, Michael Shah wants the tenant to be evicted on the theory that one or more alterations from the pre-May 2015 past was hypertechnically contrary to one of the archaic provisions of the 1968 NYC Building Code, despite his predecessor’s approval and consent.

Forfeitures are disfavored by the courts, even where they are stipulated by the parties or set forth as part of the lease.¹ The landlord wants a forfeiture; it should be rejected.

After our August 2, 2018, 2PM hearing, we located the case that we believe had been mentioned by the Court, relating to a “parking garage”:

¹ Stipulations for forfeitures found in leases are not looked upon with favor by the courts. See Gillette Bros. v. Aristocrat Restaurant, 239 N.Y. 87, 145 N.E. 748 (1924); Vanguard Diversified, Inc. v. Review Co., 35 A.D.2d 102, 313 N.Y.S.2d 269 (2d Dep’t 1970); 220 West 42 Associates v. Cohen, 60 Misc. 2d 983, 302 N.Y.S.2d 494 (App. Term 1969); Janks v. Central City Roofing Co., 271 A.D. 545, 67 N.Y.S.2d 355 (4th Dep’t 1947). Leases containing forfeiture clauses are strictly construed against the party seeking to invoke them. See Gillette Bros. v. Aristocrat Restaurant, 239 N.Y. 87, 145 N.E. 748 (1924); Janks v. Central City Roofing Co., 271 A.D. 545, 67 N.Y.S.2d 355 (4th Dep’t 1947). As a general rule, the law will not sanction a forfeiture of possession where no substantial injury occurs or where a mere technical breach of the lease is involved. See Helsam Realty Co., Inc. v. H.J.A. Holding Corp., 4 Misc. 3d 64, 781 N.Y.S.2d 554 (App. Term 2004); Harar Realty Corp. v. Michlin & Hill, Inc., 86 A.D.2d 182, 449 N.Y.S.2d 213 (1st Dep’t 1982). In addition, courts have traditionally been reluctant to enforce a substantial forfeiture where a tenant’s default was the result of inadvertence or neglect. See Birnbaum’s Estate v. Yankee Whaler, Inc., 75 A.D.2d 708, 427 N.Y.S.2d 129 (4th Dep’t 1980), order aff’d, 51 N.Y.2d 935, 434 N.Y.S.2d 994, 415 N.E.2d 982 (1980).

THE COURT: I had one involving a garage in Manhattan,
10 and it was even more tenuous than here. The Second Circuit
11 affirmed me. And it ended up that that lease was assumed.
12 Someone came in and cured the defaults.

Tr, at 63.

Annexed to this memorandum is Judge Drain's decision in 390 Park Avenue, LLC v. Park Ave. Garage, LLC, which was ultimately affirmed by the District Court, and then by the Second Circuit. See 390 Park Ave. Assocs, LLC v. Park Ave. Garage, LLC (In re Park Ave. Garage, LLC), 403 Fed. Appx. 555 (2d Cir. 2010). In that case, the cure came from not the debtor but by a guarantor and the cure went to the most fundamental aspect of a contractual relationship, the payment of consideration, or rent.

In our case, the Market has never been tardy with rent; has never suffered any DOB violation; and has never been derelict in any obligation. Not many landlords could write an affidavit of the kind written by Mr. O'Brien, stating that the Market has been a model tenant through the entire time upto May 2015.

To reiterate the essential elements, previously discussed in our memoranda, under Section 365 of the Code, subject to the bankruptcy court's approval, a debtor (not the landlord) has the option to assume or reject an unexpired lease at any time after the commencement of a bankruptcy case and before confirmation of the plan of reorganization. See 11 U.S.C. § 365(a), (d)(2). It is well established that assumption or rejection of an unexpired lease follows the "business judgment" rule, as applied by the debtor. See, e.g., Grp. of Institutional Investors v. Chicago, Milwaukee, St. Paul & Pac. R.R. Co., 318 U.S.

523, 550, 63 S. Ct. 727, 87 L. Ed. 959 (1943); ReGen Capital I, Inc. v. Halperin (In re U.S. Wireless Data, Inc.), 547 F.3d 484, 488-89 (2d Cir. 2008); In re Rock 49th Rest. Corp., No. 09-14557, 2010 Bankr. LEXIS 1223, 2010 WL 1418863, at *4 (Bankr. S.D.N.Y. Apr. 7, 2010).

“The act of assumption must be grounded, at least in part, in the conclusion that maintenance of the contract is more beneficial to the estate than doing without the other party's services.” Century Indem. Co. v. Nat'l Gypsum Co. Settlement Trust (In re Nat'l Gypsum Co.), 208 F.3d 498, 505 (5th Cir. 2000) (alteration and internal quotation marks omitted); see Orion Pictures Corp. v. Showtime Networks, Inc. (In re Orion Pictures Corp.), 4 F.3d 1095, 1099 (2d Cir. 1993) (limited purpose of motion to assume is to ensure “that valuable property is preserved and burdensome property is discarded”).

Thus, in reviewing a debtor's business judgment to assume a lease, the bankruptcy court “plac[es] itself in the position of the . . . debtor-in-possession and determin[es] whether assuming [it] would be a good business decision or a bad one.” In re Orion, 4 F.3d at 1099; see COR Route 5 Co. v. Penn Traffic Co. (In re Penn Traffic Co.), 524 F.3d 373, 383 (2d Cir. 2008) (“This standard rather obviously presupposes that the estate will assume a [lease] only where doing so will be to its economic advantage”)

Importantly: “The Code does not condition the right to assume . . . on lack of prejudice to the non-debtor party,” and “the disruption of non-debtors' expectations of profitable business arrangements” is “common in bankruptcy proceedings.” In re Penn

Traffic Co., 524 F.3d at 382. “As long as assumption of a lease appears to enhance a debtor's estate, Court approval of a debtor in possession's decision to assume the lease should only be withheld if the debtor's judgment is clearly erroneous, too speculative, or contrary to the provisions of the Bankruptcy Code.” Allied Tech., Inc. v. R.B. Brunemann & Sons, Inc. (In re Allies Tech., Inc.), 25 B.R. 484, 495 (Bankr. S.D. Ohio 1982). The motion to assume the unexpired lease should be granted.

The DOB issues raised by the new landlord are hyperbolic and collateral to the core of the lease agreement. Those matters were being fully addressed by the Market and would have been completed, had it not been for the landlord's own sabotage “complaints” against its own tenant to the DOB. The Court should hold that the landlord has engaged in breaches of the lease by breaching the duty of good faith and fair dealing; direct the landlord to execute all alteration applications that will enable the tenant to operate an eating establishment according to law; and hold that the Market will be entitled to a hearing on damages.

CONCLUSION

For the foregoing reasons, the Court should grant Debtor's motion to assume the lease; deny the landlord's contrary motion, and grant further relief as proposed above.

Dated: August 29, 2018

Respectfully submitted,

/s/ Michael Kimm

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
In Re: 08-14354 (RDD)

PARK AVENUE GARAGE, LLC, One Bowling Green
New York, New York
Debtor. June 1, 2009

-----X
TRANSCRIPT OF MOTION TO ASSUME UNEXPIRED LEASE
BEFORE THE HONORABLE ROBERT D. DRAIN
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

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For Mr. Sopher: MICHAEL BLUMENTHAL, ESQ.
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For the Landlord: RALPH BERMAN, ESQ.
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1 THE COURT: Please be seated. Okay. Park Avenue
2 Garage.

3 MR. LEINWAND: Good morning, Your Honor. Robert
4 Leinwand of Robinson, Brog, counsel for the debtor Park Avenue
5 Garage.

6 Initially, I'd like to apologize for something for
7 something that I may have misspoken on at the last hearing. I had
8 always believed that Mr. Sopher -- and I did communicate with Mr.
9 Sopher from the initiation of the case through last week in
10 Florida. Mr. Sopher does in fact suffer from a multiple myeloma
11 and I had believed, Your Honor, at the last hearing that he was
12 still in Florida. Unbeknownst to me he was in New York at the time
13 and the supplemental objection that was filed is correct that I
14 misspoke and I apologize for that.

15 It still does not impact adversely my statement that he
16 does suffer from an illness and he could not attend, physically,
17 this hearing at this time. He is here in New York and next, I am
18 advised, that he is going to Little Rock, Arkansas for more
19 treatment and I just wanted to make the record clear and I
20 apologize for the misstatement, it was inadvertent at the time and
21 it's inadvertent today. I just apologize for that.

22 In any event, at the last hearing Your Honor requested
23 that we continue this proceeding until today and that Mr. Sopher,
24 the guarantor of the obligation to the landlord of the debtor's
25 obligation pursuant to its executory contract, prepare a sworn

1 declaration under perjury which does two things; (1) acknowledges
2 his obligations pursuant to providing adequate protection of future
3 performance -- adequate assurance of future performance as well as
4 to declare under penalty of perjury that he has sufficient assets
5 or is in control of sufficient assets in order to pay the cure
6 amounts as well as to pay any deficiency that might arise
7 throughout the proceeding. We have so filed and served that
8 declaration and believe that that demonstrates the ability of Mr.
9 Sopher to assist the debtor in paying the cure amount and also
10 providing adequate assurance of future performance.

11 THE COURT: Okay. Let me ask you -- tell me, again, why
12 is it that Mr. Sopher wants to do this?

13 MR. LEINWAND: In the event -- my understanding is that
14 in the event that this lease is deemed rejected, then the
15 obligation of the guarantor will be the total obligation of the
16 balance reserved under the lease without any cap pursuant to the
17 Bankruptcy Code or any other limitation. Under those
18 circumstances, absent a mitigation, he would also be obligated to
19 pay the obligation of Icon, the manager. If the lease was rejected
20 the management agreement would be deemed rejected and he would have
21 to pay Icon a sum in excess of \$100,000.00 as liquidated damages.
22 Also, he would be obligated for the balance of the lease pursuant
23 to his guaranty so that by assuming the lease he would limit his
24 obligations to the landlord.

25 Your Honor should be made aware that a judgment was

1 entered against Mr. Sopher as guarantor in the state court. I am
2 advised that there is a hearing this afternoon at 2:30 pending a
3 determination of this Court as to the assumption as to what the
4 state court judge will do with respect of that judgment. As of
5 today, while the judgment was entered on Friday morning at about
6 9:30, the execution of that judgment has been stayed pending this
7 afternoon's hearing and a determination by Your Honor.

8 So Mr. Blumenthal is here representing the guarantor. I
9 have always been advised that the guarantor wished from the
10 initiation of the onset of this case that the lease be rejected.
11 As I mentioned at the last hearing -- I'm sorry, that the lease be
12 assumed. As I mentioned at the last hearing he had desired -- the
13 desire of the debtor was simply to assume and assign the lease to a
14 third party so that the third party would be responsible for the
15 obligations in the lease and that did not work out.

16 We're now here at the eleventh hour or the 210th day of
17 this case and it is necessary for the debtor to obtain an
18 assumption of this lease so that the debtor will continue to have
19 its main asset and the benefit to the guarantor is that his damages
20 pursuant to the existing judgment and any potential judgment the
21 landlord would have would be limited.

22 THE COURT: So it's not a favorable lease. It's not an
23 above market lease -- I mean a below market lease. Excuse me.

24 MR. LEINWAND: At the moment we believe it is an above
25 market lease in the sense that we could not find any entity -- and

1 we looked -- who would take the lease from us at or more than or
2 even less than the amount we're paying. So I believe that is in
3 fact an above market lease at this time.

4 THE COURT: Okay.

5 MR. BLUMENTHAL: Your Honor, if I just may add one or
6 two things.

7 Michael Blumenthal representing Jacob I. Sopher, who is
8 in fact one of the guarantors of this lease.

9 One of the additional reasons or rationales for
10 assumption is that as we're all aware as the real estate market
11 ramped up over the last five to seven years and now it's undergoing
12 -- at least in the commercial real estate markets -- some downturn,
13 the primary reason that there's a deficit is the increase in real
14 estate taxes which the tenant under the lease is responsible for.
15 If this lease is assumed there are ten years remaining. If,
16 firstly, the revenues of the parking garage increase as well as if
17 there is in fact some relief with respect to the real estate taxes
18 which are passed through this lease may at some point in the future
19 become a profitable lease and, therefore, that's another reason why
20 the debtor as well as the guarantor would respectfully request that
21 it be assumed.

22 THE COURT: Okay. Is there a security deposit in
23 connection with the lease at this point?

24 MR. LEINWAND: I don't think there's an existing
25 security deposit at this point, Your Honor.

1 THE COURT: Okay. All right. Counsel, do you have a
2 power of attorney to speak for Mr. Sopher today to commit him to
3 things? For example, if I said I wouldn't approve this unless
4 there were X dollars put up as a security deposit for X months rent
5 or anything like that?

6 MR. BLUMENTHAL: Well, Your Honor, I'm here representing
7 him as counsel. I don't have power of attorney. There is a
8 representative from his office. What we would respectfully request
9 is that the order that Mr. Leinwand has proposed is that the
10 payments be made in five installments. As Your Honor is aware, Mr.
11 Sopher has in fact supplemented the debtor throughout these
12 proceedings to make sure that the lease payments are current. He
13 will continue to do so. He has the wherewithal to continue to do
14 so.

15 I've been authorized if His Honor wishes to show His
16 Honor a financial statement in camera which reflects his ability to
17 do so. It just is not something he wants to put on the record.

18 Without knowing what the Court would request I'm not
19 sure I could respond. Could I just have one moment, Your Honor?

20 THE COURT: Okay.

21 (Pause in proceedings)

22 MR. BLUMENTHAL: As I indicated, we would respectfully
23 request that we make the monthly payments to cure the arrears. I
24 do know that, also, the order that Mr. Leinwand is proposing
25 contains a ten day notice provision that if there's a failure to

1 make the cure, the "monthly payments as well as the incremental
2 cure payments," and it's not cured, the lease would terminate or be
3 deemed rejected and so we think that what is being proposed is
4 eminently reasonable and we would respectfully request Your Honor
5 to grant the relief.

6 THE COURT: Okay. Mr. Leinwand, what is the end game in
7 this case? If the lease is assumed what's the next step?

8 MR. LEINWAND: If the lease is assumed, Your Honor, what
9 we intended to do was to await the end of the five month period to
10 make sure this Court retained jurisdiction so that if there was a
11 default and the default wasn't cured on ten day's notice there
12 would be no rope-a-dope [sic] or anything like that but that
13 counsel for the landlord could notice an order. The only defense
14 that the debtor would have is that payment was made and so we would
15 be assuring payments made and in the event that payment was not
16 made, then Your Honor could enter an order rejecting the lease.

17 Subsequent to that five month period it was our belief
18 that we could either file a plan or enter into a structured
19 dismissal. I believe that no other creditors who would not be paid
20 in full would be adversely effected or not agree to a structured
21 dismissal at that point in time, Your Honor, but that would be
22 subsequent to all of the arrearages as finally determined by this
23 Court or agreed by the parties were paid in full.

24 THE COURT: Okay. What is the monthly rent plus the
25 other charges under the lease?

1 MR. LEINWAND: I believe it's somewhere in the
2 neighborhood of \$63,000.00.

3 THE COURT: Okay.

4 MR. BERMAN: Your Honor, Ralph Berman of Epstein, Becker
5 & Green representing the landlord.

6 First of all, just as a housekeeping matter, on Friday
7 we electronically filed a supplemental objection. I don't know if
8 the Court had an opportunity to see it --

9 THE COURT: I did review that.

10 MR. BERMAN: Very good. Well, I guess to start with by
11 addressing the new material that's come up is when Your Honor asked
12 what the purpose of all of this was I heard a lot of explanation
13 that involves protecting Mr. Sopher. I really still haven't heard
14 anything that has to do with the interests or the operation of the
15 debtor.

16 THE COURT: Well, I asked what Mr. Sopher's purpose was
17 in doing this.

18 MR. BERMAN: Well, I guess I understand Mr. Sopher's
19 purpose, I still don't understand what the debtor's purpose is.
20 The debtor is a shell entity that has a single asset that doesn't
21 even operate the garage that's at issue and Mr. Sopher is
22 essentially a guarantor who is seeking the protection of the
23 Bankruptcy Code in the name of his shell entity without actually
24 filing bankruptcy. He has an obligation and the obligation is not
25 one that is modified in any way by the Bankruptcy Code and he's

1 trying to obtain the benefit of Bankruptcy Code protection without
2 actually having done the work of being in bankruptcy.

3 THE COURT: I think you'd be better served not focusing
4 on the arguments that I already ruled against you on on the
5 dismissal point and focusing on adequate assurance of future
6 performance and cure.

7 MR. BERMAN: Well, on the issue of adequate assurance
8 and cure, all I can say is that the statement that was provided by
9 Mr. Sopher is nothing more than a restatement of obligations he
10 already has and not only has already breached but is currently in
11 breach of.

12 The afternoon of the day we were last before Your Honor
13 I was in New York State Supreme Court where Mr. Sopher was seeking
14 to stay the entry of a judgment to pay the very sums he is standing
15 here promising he will pay. He has no intention of honoring his
16 obligations, that is a demonstrated fact. The mere fact he's put
17 in another paper where he says, I'm good for it, is not adequate
18 assurance of anything. The mere fact he puts in a piece of paper
19 that says, I have the assets, is not adequate assurance of
20 anything. The State Supreme Court said, I will give you a stay,
21 secure the judgment. He refused to. If he didn't have the money
22 to secure the judgment in State Supreme how does he have the money
23 to secure adequate assurance here?

24 THE COURT: Let me make sure -- I'm going to parse this
25 through. Tell me if I've missed something.

1 You're making two arguments; the first argument is that
2 he doesn't have any intention to perform consistent with the
3 statute as evidenced by the fact that he hasn't performed his
4 guaranty. There's an intention point. You can't trust him.

5 MR. BERMAN: That's correct, Your Honor.

6 THE COURT: The second point is that you do not accept
7 the statement without additional evidence that he actually has the
8 assets even if he wanted to perform. Is that also the argument
9 you're making?

10 MR. BERMAN: That's correct, Your Honor.

11 THE COURT: Okay. It sounded like two pretty good
12 arguments given the facts here, Mr. Leinwand.

13 MR. LEINWAND: Well, the trust argument is an
14 interesting argument and, again, I don't think Mr. Berman believes
15 that Mr. Sopher doesn't have the assets. I think that the
16 principal of his client and Mr. Sopher go back a long, long, long
17 way -- many millions of dollars have passed hands both ways over
18 the years and this becomes more than a separate financial situation
19 but it's a flexing of muscle and a, I can get you before you get
20 me, and I think that is what one of the real problems is and it's
21 made it difficult for me and has taken me to the eleventh hour in
22 which to get what I think is a simple matter.

23 I think the "trust me" argument is over in the event
24 that he does not make a payment or the debtor doesn't make a timely
25 payment from now on because we're not in a state court, we're

1 before Your Honor and Your Honor has the commitment from the debtor
2 that it will pay the obligations in a timely manner and absent to
3 do that Draconian results and easy results follow through. So the
4 "trust me" argument, I think, is a frustration argument that
5 landlord is having because the guarantor has frustrated the
6 collection of dollars, although that collection together with post-
7 judgment interest as awarded by the state court is going to be an
8 obligation and they're going to get the money.

9 The question of lack of ability to pay is another red
10 herring. I think at the last hearing Mr. Berman did not indicate
11 that Mr. Sopher didn't have the ability to pay but it was "part of
12 a rope-a-dope" defense that Mr. Sopher was doing.

13 So, Your Honor, I think that --

14 THE COURT: Well, do you agree with that?

15 MR. BERMAN: No, Your Honor. The point I made at the
16 last hearing and the point I made here is very simple. Mr. Sopher
17 has a certain reputation -- many people in the world have a certain
18 reputation -- he runs garages in a bad economy through a series of
19 shell corporations.

20 I don't know if he has the money or not. He has
21 certainly done nothing to establish it here. We don't have to go
22 on his reputation or what we speculate he may have.

23 MR. LEINWAND: Your Honor, I think Mr. Blumenthal made
24 an offer to show you --

25 THE COURT: But that doesn't -- I'm not going to -- I

1 mean the landlord has to have an opportunity to test that. Just
2 having me look at it in camera is not going to do it.

3 MR. LEINWAND: I've seen it and, Your Honor -- I mean
4 I'll let Mr. Blumenthal -- I told Mr. Sopher on the phone on Friday
5 that if he came down here and testified it would be a slam dunk and
6 he said to me, physically, he could not physically come down here
7 before noon. That was his comment to me and if in fact we have to
8 have his live testimony to indicate that he has sufficient dollars
9 in which to pay we can go do that.

10 I was not in state court, Mr. Blumenthal was on Friday
11 and Mr. Sopher's other counsel was in the court on Thursday with
12 Messrs. Allman and Berman and I'm advised at that point in time the
13 Judge was going to stay the entry of the judgment, however, while
14 he was determining what to do the judgment was entered and instead
15 of staying the entry of the judgment what he did was stay the
16 execution of judgment.

17 I think that it's --

18 THE COURT: But I thought you said that was in light of
19 just giving me some time to deal with this today.

20 MR. LEINWAND: That's correct. It's in light of having
21 --

22 THE COURT: It wasn't based on his financial performance
23 or anything like that?

24 MR. LEINWAND: No. The whole concern of Mr. Sopher was
25 paying twice. His concern was that if he paid upon his guaranty

1 pursuant to the judgment he would have to pay again. That's what
2 his concern was. He didn't want to have to pay twice and,
3 therefore -- because the debtor had the arrearages and the debtor
4 would have to pay and that was his concern and that's why he wanted
5 a determination from this Court prior to a determination from the
6 state court and he wanted the two courts to meld together so that
7 the determination by this Court that he had five months to pay
8 would satisfy the obligation of the state court.

9 THE COURT: But, you know, it makes me a little nervous
10 when he's asking for five months, then maybe he doesn't really have
11 the wherewithal to pay.

12 MR. LEINWAND: I understand that.

13 MR. BLUMENTHAL: Your Honor, if I might add one or two
14 items.

15 I was in state court on Friday, a place I generally
16 don't practice law, but Judge Stallman asked us after we presented
17 argument to the Court and indicated that he was in fact going to
18 stay entry of the judgment, he wanted to write the order and
19 indicated that he wanted us to come back this afternoon. In my
20 opinion, it also indicated that if Your Honor gave the debtor five
21 months to cure he would, likewise, make rulings in the state court
22 to comport and be consistent with the time that the debtor would
23 have.

24 Just so Your Honor knows, the amount of the cure that is
25 the agreed upon cure is in excess in fact of the judgment that they

1 sought to obtain so, therefore, if the debtor is given five months
2 and has paid back over five months they will get more than the
3 amount in the judgment. Likewise, if Your Honor determines that
4 the disputed portion of the cure is due or such amount is due that
5 would, likewise, be added to the payments that are being made.

6 When you indicate or you suggested, why does he want
7 five months, we have as is the case with many real estate
8 situations there are certain cash flow considerations. Mr. Sopher
9 does have the wherewithal to pay it. He's requesting that it be
10 paid back. \$500,000.00 is not an insignificant amount of money in
11 context of the monthly rental of \$63,000.00 to pay it over five
12 months. He does have the wherewithal to pay it, Your Honor. There
13 is no gamesmanship going on here. He's just along with the debtor
14 requesting some additional time to make the cure.

15 THE COURT: Okay. Judge Craig in her recent case in the
16 Fine Lumber case expresses a concern about protecting the landlord
17 if in fact the debtor defaults post-assumption and notes that it
18 would take, I think, three months to relet the premises there and
19 in light of that she required in addition to the one month's
20 security deposit that existed under that lease another two month's
21 security. Has the landlord looked at reletting the premises here?

22 MR. BERMAN: No, Your Honor, not at this point.

23 THE COURT: Do you have any estimate of how long it
24 would take to find a replacement?

25 MR. BERMAN: I honestly don't, Your Honor. It's a

1 difficult economy. It's a parking garage so it presents some
2 unique situations. It's not just simple commercial space.

3 THE COURT: It's acknowledged that it's not a favorable
4 lease so you'd probably be reletting at a lower amount.

5 MR. BERMAN: Yes, so that seems almost certain both in
6 this economy and under the circumstances but I don't have any
7 figures or dates for you.

8 THE COURT: Okay.

9 MR. BLUMENTHAL: Your Honor, there had been
10 negotiations. I believe Icon, who manages the garage, in fact
11 would lease it. It may not be for the full amount of the lease.
12 There's some issue with regard to real estate taxes which Mr.
13 Sopher would still be liable for. So we don't think that there is
14 an issue that it would be a lengthy period of time. This is prime
15 real estate and --

16 THE COURT: Well, there is a logical tenant -- you're
17 saying there's a logical tenant because there's -- the company
18 operating the garage itself.

19 MR. BLUMENTHAL: That's correct, Your Honor.

20 MR. BERMAN: Well, Your Honor, I will say that I do know
21 that it has been at least explained to us -- I have no personal
22 knowledge of this -- that the reason Icon is operating that garage
23 is because they acquired certain other Sopher garages and they are
24 doing it as part of the deal as an accommodation to Sopher. So the
25 idea that they are readily available as a tenant if Sopher is not

1 on the scene, I just can't answer that question one way or the
2 other.

3 THE COURT: Okay.

4 MR. BLUMENTHAL: That is not a correct statement but --

5 THE COURT: Well, let me just pose this to you.

6 What is the harm to the landlord of a situation where
7 the lease is assumed and the first payment or the first cure
8 payment isn't made and at that point the stay is lifted?

9 MR. BERMAN: Your Honor, if the payments are made and
10 the stay is lifted, I guess the landlord can minimize the damage
11 done.

12 I would like to note, though, that if adequate assurance
13 consisted simply of saying, if we let them assume we'll see if they
14 honor it and then if they don't they're out, then there really is
15 no adequate -- there's no extra component to adequate assurance.
16 Adequate assurance is supposed to be an assurance to the landlord
17 that that's probably not going to happen, not that that's your best
18 scenario and so I would argue that if we're sitting here talking
19 about, well, there really is no assurance of future performance but
20 you'll be okay because if they don't perform they'll be out, then
21 we've basically written the whole requirement of adequate assurance
22 out of the Bankruptcy Code. That can always be done with a lease.
23 Every lease should then be assumed when requested. There's an
24 extra hurdle there, there's extra protection for the landlord and
25 that's what we're seeking here.

1 We're going to be back here. We know it. We're going
2 to be back with Sopher. If he stays under the jurisdiction of the
3 Court for five months and he acts good we know we're going to be
4 back with him. We want to be rid of him and we want to be rid of
5 him soon.

6 MR. LEINWAND: Your Honor, the economics of it is clear.
7 They have -- by permitting the debtor to assume the lease they will
8 get more money in the next five months or the balance of the lease
9 than they would, probably, under any other scenario.

10 What they want to do is punish the guarantor for not
11 coming forward earlier and satisfying the judgment. We have
12 presented to Your Honor the ability to cure and the ability to cure
13 if we don't do, not only will they lift the stay but Your Honor has
14 the opportunity and we have consented to Your Honor entering an
15 order deeming the lease to be rejected. I think that's --

16 THE COURT: I think I'm going to need to have the
17 accountant's certificate introduced into evidence.

18 MR. LEINWAND: The concern that Mr. Sopher had was by
19 making public his financings he was very concerned that it would be
20 utilized against him by landlords and landlords' attorneys. This
21 is what I heard. I can't speak to putting it into evidence, Your
22 Honor.

23 THE COURT: But I mean if that's because he's not in
24 good financial condition then --

25 MR. LEINWAND: It's not because he's not in good

1 financial condition. I think it's because he is in good financial
2 condition that he doesn't want to have a road map for --

3 MR. BERMAN: Well, his judgment creditors might be able
4 to find the assets.

5 MR. BLUMENTHAL: Your Honor, if I may just add one other
6 thing.

7 I think counsel to the landlord indicated what they
8 really want when he said they wanted to be "rid of him." They want
9 to terminate this lease and at the same time collect on a guaranty
10 and at the same time seek another tenant. Frankly, under the Code
11 and the case law under the Code, when adequate assurance is the
12 issue, the adequate assurance is generally the adequate assurance
13 that existed at the time of entering into the lease. At the time
14 they entered into the lease they accepted this tenant --

15 THE COURT: No, that's not right. It's adequate
16 assurance as of the date of the motion. Conditions may completely
17 change between the date of the lease and the date of the motion.
18 They believe their tenant was able to pay too.

19 MR. BLUMENTHAL: Your Honor, they knew that the tenant
20 was an entity that was a special purpose entity owning this garage
21 and they accepted the guaranty of Mr. Sopher.

22 He is ready, willing and able, Your Honor, and as I
23 indicated we would show the financial statements to His Honor in
24 camera. We didn't want it plastered over the record and I think
25 the fact that the proposal which is if he misses a payment, then

1 the lease would be automatically terminated is really protecting
2 the landlord to protect against what they're calling gamesmanship.

3 I think that it's a fair resolution and, frankly, every
4 payment has been made since the filing of this petition. The
5 deficits of the monthly payments have in fact been made up. The
6 lease is current on a post-petition payment.

7 MR. LEINWAND: Except the May payment. The May payment
8 has not been paid.

9 MR. BLUMENTHAL: But hasn't that been -- the May payment
10 was paid.

11 MR. LEINWAND: Was paid. I'm sorry.

12 MR. BERMAN: We have no record of the May payment, Your
13 Honor.

14 MR. BLUMENTHAL: Mr. Orvack is in -- it has made
15 payment?

16 MR. ORVACK: It was made --

17 THE COURT: But am I right that most of those payments
18 have been made by the debtor and Mr. Sopher has been making up the
19 difference?

20 MR. LEINWAND: That is correct, Your Honor. The debtor
21 receives essentially the base rent from Icon and pays the
22 difference being the taxes and has continued to pay the difference
23 throughout the case in a timely manner.

24 MR. BLUMENTHAL: Pursuant to Your Honor's prior order.

25 THE COURT: Okay. All right. Anything else?

1 MR. BERMAN: Well, Your Honor, if I may just concerning
2 this so we're clear on the situation we're dealing with.

3 On Friday night we were also informed that Mr. Sopher's
4 state court counsel is appearing in State Supreme this morning to
5 make yet another order to show cause application, the nature of
6 which has not been made clear to us yet. So the gamesmanship
7 continues while the promises that the gamesmanship will end have
8 not.

9 THE COURT: Well, I'm really less worried about the
10 gamesmanship since I can control that with an order as adequate
11 assurance of future performance and, to me, that's a significant
12 issue here given the record.

13 So the debtor is essentially a single asset entity; it
14 owns -- or it is the tenant under a lease and then subleases the
15 leased premises for the purpose of the operation of a parking
16 garage at 390 Park Avenue.

17 It has moved to assume the lease which under the
18 Bankruptcy Code would expire today, 210 days having run at the end
19 of today from the start of its Chapter 11 case. The landlord 390
20 Park Avenue Associates has objected motion asserting that the
21 debtor is unable to satisfy the requirements of Section 365(b) of
22 the Code. The Bankruptcy Code permits a debtor-in-possession to
23 assume an unexpired lease if it does three things; first, cures or
24 provides or adequate assurance that it will promptly cure a default
25 under the lease and we're talking about monetary defaults here so

1 the rest of 365(b)(1)(a) is inapplicable or irrelevant, secondly,
2 it compensates or provides adequate assurance that the debtor will
3 promptly compensate the landlord for any actual pecuniary loss to
4 such party resulting from the default and, third, provides adequate
5 assurance of future performance under such lease. Again, we're
6 talking about monetary defaults here and future performance under
7 rental provisions of the lease. Those are the defaults that the
8 landlord has raised and contends that the debtor will not be able
9 to perform either in respect of curing the defaults or providing
10 adequate assurance of future performance.

11 The debtor acknowledges that it, itself, is unable to
12 perform the ongoing obligations under the lease in full. It
13 acknowledges, more specifically, that its income from the parking
14 garage is insufficient to pay all of the amounts coming due on a
15 monthly basis under the lease when one takes into account among
16 other things the tax obligations under the lease. If it is not
17 able even to perform the monthly obligations under the lease it's
18 clearly not able to pay the amount of cure to the landlord. That
19 amount is in dispute, however, the debtor acknowledges that,
20 clearly, almost \$500,000.00 would be owed as cure. The landlord
21 contends, based upon a judgment that it received some time ago and
22 its calculation of its attorneys fees which it contends are
23 provided for as rent under the lease, that it is owed in excess of
24 \$700,000.00 of cure.

25 The debtor proposes to do two things to satisfy its

1 burden under Section 365(b); first, it proposes to have its
2 principal, who also guarantied the lease, Jacob Sopher, to make up
3 the cure payments over a period of five months and, secondly, have
4 Mr. Sopher make up any shortfall in terms of the monthly payments
5 coming due under the lease. As to the latter point, Mr. Sopher has
6 done that during the course of the Chapter 11 case. The debtor has
7 remained current on the lease since the petition date with the
8 assistance of Mr. Sopher and the debtor would propose that that
9 would continue. The debtor also acknowledges that the cure will be
10 whatever the Court determines to be the cure, that is the proposal
11 to have Mr. Sopher pay the cure payments is not conditioned upon or
12 contingent upon the Court determining the cure comes in within a
13 specified amount but, rather, that Mr. Sopher will take the risk
14 that the landlord is correct and that the cure is substantially
15 higher than the amount that the debtor contends it is.

16 Given that concession or that agreement I have not done
17 more than try to read the fine print of the lease and determine
18 whether in fact there would be a basis for the higher amount
19 claimed by the landlord as well as looked at the underlying
20 judgment and it appears to me that there is a legitimate issue and
21 that the cure may well be substantially more than the slightly
22 under \$500,000.00 amount that the debtor acknowledges.

23 In support of the proposed cure and adequate assurance
24 of future performance by the debtor, Mr. Sopher has submitted an
25 affidavit dated May 28, 2009 in which he states that he is aware of

1 the debtor's burden in assuming the lease and, more specifically,
2 that the debtor must cure all arrearages and provide the landlord
3 with adequate assurance of future performance. He then states that
4 he has agreed to make certain that the debtor will have the
5 wherewithal to cure all arrearages which are finally determined by
6 the Court over a five month period and that he will make the
7 appropriate capital infusions to the debtor to make certain that
8 the arrearages are cured and that in the future the debtor will
9 have sufficient dollars to timely make its payments to the landlord
10 pursuant to the terms of the lease. Thus, I now do have his
11 commitment under oath that he would in fact make the payments that
12 the debtor has contended he will make.

13 He then states in Paragraph 6 of his affidavit that he
14 has control of and access to more than sufficient liquid assets to
15 pay all of the arrearages pursuant to the lease as determined by
16 the Court and will have sufficient assets to pay any differential
17 between the debtor's receipts and its obligations pursuant to the
18 lease throughout the balance of the terms of the lease.

19 He then states, "If the Court requires I will submit a
20 certified accountant's affidavit under seal that my assets are more
21 than sufficient to pay any obligations which the debtor must make
22 in order to cure the arrearages and assure the landlord of future
23 payments pursuant to the lease." He's not present to testify
24 today. It's stated that his health prevents his testimony,
25 although, I have no evidence, frankly, before me of that other than

1 counsel's representation.

2 Secondly, he is not prepared or apparently has not
3 instructed his counsel to be prepared to submit the accountant's
4 certificate that he references in his affidavit except for in
5 camera review. Therefore, it's not available to be tested by the
6 landlord and evaluated on the record. The rationale for Mr.
7 Sopher's unwillingness to do this raises a serious concern with me
8 in that it appears that Mr. Sopher has a concern about reviewing
9 his net worth in public.

10 The landlord also points out that Mr. Sopher as I noted
11 previously guarantied the lease and that he refused to honor the
12 guaranty and that the landlord had to obtain a judgment against him
13 in respect of the guaranty which it has done and that he continues
14 to seek to delay payment under the guaranty.

15 The debtor responds by saying that the reason he's
16 seeking to delay payment is that he would like the entire matter
17 resolved pursuant to an order of this Court authorizing assumption
18 of the lease and Mr. Sopher's payment pursuant to his undertakings
19 to this Court which is fairly credible. On the other hand, given
20 the record before me, notwithstanding counsel's statement at the
21 prior hearing -- counsel for the landlord's statement at the prior
22 hearing that it appears that Mr. Sopher is a wealthy man. I have
23 serious concerns about Mr. Sopher's undertaking. Those are based
24 on three things; first, the fact that he's not been willing to
25 share or submit in public to a review of his financial wherewithal

1 on the record, secondly, the fact that he's not proposing a cure
2 immediately but rather one over five months. It appears to me
3 based on counsel's remarks that that five month period is not
4 premised upon what one would assume to be a reasonable time to
5 determine the amount of cure but, rather, it's based upon cash flow
6 issues that Mr. Sopher has and, thirdly, I do have some concern
7 about the fact that Mr. Sopher has, first, in respect of exerting
8 his control of the debtor and, secondly, in his own account
9 resisted performing obligations to the landlord such that the
10 landlord had to obtain a judgment not only against the debtor but
11 also against Mr. Sopher individually after he did not perform his
12 guaranty.

13 The courts have found that the meaning of the phrase
14 "adequate assurance of future performance" is one that should be
15 given a practicable and pragmatic instruction based on the facts
16 and circumstances of each case. Ultimately, the inquiries whether
17 the rent will be paid going forward as well as the other lease
18 obligations being met, as noted by a number of courts, the emphasis
19 is on protection of the landlord, not on giving the landlord
20 improvement of its position. In determining whether adequate
21 assurance of future performance has been shown courts have
22 considered at least the following factors; the debtor's payment
23 history, the presence of a guaranty, the presence of a security
24 deposit, the evidence of profitability, whether there's any plan
25 that would earmark money for the landlord, the general outlook of

1 the debtor's industry and whether the unexpired lease is at or
2 below the prevailing rate. Most of these factors here favor the
3 landlord as opposed to the debtor. The debtor's payment history is
4 one where it's acknowledged that the debtor on its own is not able
5 to perform the lease going forward. There's no security deposit.

6 Again, the lease itself is not profitable and the
7 debtor, accordingly, is not profitable since the lease is its only
8 asset and the lease is not at or below the prevailing rate. It's
9 not a favorable lease. The debtor has been unable to market the
10 lease to a third party during the course of this case which it had
11 attempted diligently to do. That puts an enormous amount of burden
12 on the presence of the guaranty offered up by Mr. Sopher.

13 I understand the rationale for his undertaking to cure
14 the defaults and provide for adequate assurance of future
15 performance. It's clearly more economical for him to maintain the
16 value that's in the lease and make up the shortfall as opposed to
17 being liable for the entire rejection claim. So he clearly does
18 have a motive to perform and it's not a motive that changes with
19 economic conditions since, ultimately, he's looking at his own
20 liability for a rejected lease as the alternative to assuring
21 future performance. On the other hand, while I have confidence in
22 his motive and while I believe that the debtor has in its
23 willingness to provide a conditional order, providing that the stay
24 will be lifted if the payments are not made, minimized the risk to
25 the landlord it seems to me that based on this record which is

1 scant with hard information of Mr. Sopher's ability to pay, one
2 where I'm essentially taking his word for it and I'm not prepared
3 to do that, it seems to me given the fact that the lease is
4 underwater that the landlord should have additional protection in
5 the event that Mr. Sopher chooses not to pay or is unable to pay
6 going forward.

7 The monthly charge is roughly \$63,000.00. I believe
8 that as a condition to being able to assume the lease that Mr.
9 Sopher should be required to post a deposit of three month's rent
10 in addition to the undertakings that he's made in the affidavit
11 that he submitted to me and the conditional order that the debtor
12 has offered up. If he's not able to come up with that sum, then it
13 seems to me there's not adequate assurance of future performance
14 and if he's not able to come up with that sum within the week, then
15 the stay will be lifted.

16 MR. LEINWAND: Your Honor, we understand what you just
17 said.

18 THE COURT: I think, frankly, you should confer with him
19 about this because there's no reason for the debtor to take on an
20 administrative expense burden if you can't do that.

21 MR. LEINWAND: I understand that. We will confer with
22 him. My understanding is that at this point in time he has no
23 other option but to agree with that and I anticipate running back
24 to my office and changing the order a little bit to add this
25 condition of the three month's posting of security within one week

1 otherwise the stay gets lifted from the order and I would ask Your
2 Honor if I did that would Your Honor entertain such an order if I
3 was to --

4 THE COURT: I would under the authority of among other
5 cases, In Re: N. Fine Lumber Company, Inc., 383 BR 565, Bankruptcy
6 E.D., NY 2008.

7 MR. LEINWAND: Thank you, Your Honor. I will speak to
8 your chambers to see if I can expedite it by electronic mailing to
9 you the proposed order and I appreciate your determination based
10 upon the scant record and I apologize for making it such a record
11 but I understand what the situation is and, hopefully, all parties
12 will come out of here better off.

13 THE COURT: Okay.

14 MR. BLUMENTHAL: Your Honor, just one clarification.

15 The posting of the three month's security deposit, could
16 that be posted in Mr. Leinwand's care as co-counsel?

17 THE COURT: No, it should be a true security deposit
18 with the landlord.

19 MR. BLUMENTHAL: But an escrow account.

20 THE COURT: Well, why would it be in escrow as opposed
21 to with the landlord?

22 MR. BLUMENTHAL: I mean I understand what you're saying

23 --

24 THE COURT: Well, the purpose of this is so that the
25 landlord has real money to support it if Mr. Sopher walks.

1 MR. BLUMENTHAL: I think that's it. I think it's a
2 security deposit in the event that payments are not made pursuant
3 to the order as well as the lease and in the event that those
4 payments are made at the end of the lease it will be returned to --

5 THE COURT: Right. This is supposed to continue more
6 than five months. This is supposed to continue for the duration of
7 the lease.

8 MR. BLUMENTHAL: That's correct, Your Honor.

9 THE COURT: Okay.

10 MR. BLUMENTHAL: Thank you, Your Honor.

11 MR. BERMAN: Your Honor, if I may just one thing.

12 In rendering your decision -- I don't think it effects
13 the decision at all -- but you mentioned that our proposed cure
14 amount was seven hundred some odd thousand dollars, it's actually
15 nine hundred some odd thousand in various categories.

16 THE COURT: You're right. It was higher.

17 MR. BERMAN: So I just wanted to make sure the record
18 was clear on that.

19 THE COURT: That's fair.

20 MR. LEINWAND: I think Your Honor said in excess of
21 seven. I think is in excess of seven --

22 THE COURT: Well, it seemed to me -- I was focusing on
23 amounts that -- there's a very strong possibility it's going to be
24 in excess of the roughly 480 or 490 that the debtors have and
25 whether it goes all the way to 900 is another issue but it's a

1 significant number.

2 MR. LEINWAND: We understand. Thank you, Your Honor.

3 THE COURT: Okay.

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C E R T I F I C A T I O N

I certify that the foregoing is a transcript from
an electronic sound recording of the proceedings in the
above-entitled matter taken on June 1, 2009, except where,
as indicated, the Court has modified the transcript.



CARLA NUTTER



June 2, 2009

DATE